LIBRARY
SUPREME COURT, U. S.

FILED
MAR 4 1967
JOHN F. DAVIS, CLERK

No. 1119
5-8

In the Supreme Court of the United States

OCTOBER TERM, 1966
7

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., AND NEW AMSTERDAM CASUALTY COMPANY,
Respondents,

vs.

R. C. ENOS, Deputy Commissioner,

and

AGNES M. BANKS, widow of JOHN J. BANKS, deceased, and representative of JAMES M. BANKS, JANICE BANKS, AND CATHERINE M. BANKS, minor children of JOHN J. BANKS, deceased,
Petitioner.

PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

HAROLD A. LIEBENSON
77 West Washington Street
Chicago, Illinois 60602
RAndolph 6-9242
Attorney for Petitioner

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Conclusion	18
Finding of Fact and Conclusions of Law of District Court	11a
Opinion of Court Below	1a-10a
Order of District Court on Petition to Intervene	13a
Petition	1, 2
Questions Presented for Review	2, 3
Raising the Federal Question	7
Reasons for Granting Writ of Certiorari	7-17
Reference to Reports of Opinions	2
Statement of the Case	4-7
Statutes and Regulations Involved	3, 4

List Of Authorities Cited.

Cases.

American Mutual Liability Ins. Co. of Boston v. Lowe, 85 F. 2d 625 (C.A. 5 1936) 8, 12, 14

Bethlehem S. B. Corp. v. Cardillo, 102 F. 2d 299 (C.A. 1 1939) 8

Calbeck v. A. D. Suderman Stevedoring Co., 290 F. 2d 308 (C.A. 5 1961) 16

Candado Stevedoring Corp. v. Willard, 185 F. 2d 232 (C.A. 2 1950) 8, 12, 14

Flamm v. Hughes, 329 F. 2d 378 (C.A. 2 1964) 14

International U. United A.A. & A.I.W. v. Scofield, 86 S. Ct. 373 (1965), 382 U.S. 205 ..... 8, 11

PAGE

Jarka Corp. v. Hughes, 299 F. 2d 534 (C.A. 2 1962) ..8, 16

Maryland Cas. Co. v. Cardillo, 99 F. 2d 432 (C.A. D.C. 1938) 8

Seaboard Marine Repair Co. v. Cardillo, 166 F. 2d 431 (C.A. 2 1948) 8, 12, 14

Stansfield v. Lykes Bros. S.S. Co., 124 F. 2d 999 (C.A. 5 1942) 16

Tudman v. American Ship Bldg. Co., 170 F. 2d 842 (C.A. 7 1948) 16

U. S. Casualty Co. v. Taylor, et ux, 64 F. 2d 521 (C.A. 4 1933) 10

Vendemia v. Christaldi, 221 F. 2d 103 (C.A. D.C. 1955) 12

Voris v. Eikel, 346 U.S. 328 (1953) 12

STATUTES.

Longshoremen's and Harbor Workers' Compensation Act

Sec. 22 (33 U.S.C. 922) 3, 4

Sec. 21 A (33 U.S.C. 921a) 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

No.

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., AND NEW AMSTERDAM CASUALTY COMPANY,

Respondents,

vs.

R. C. ENOS, Deputy Commissioner,

and

AGNES M. BANKS, widow of JOHN J. BANKS, deceased, and representative of JAMES M. BANKS, JANICE BANKS, AND CATHERINE M. BANKS, minor children of JOHN J. BANKS, deceased,

Petitioner.

PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Agnes M. Banks, widow of John J. Banks, deceased, and representative of James M. Banks, Janice M. Banks, and Catherine M. Banks, minor chil-

dren of John J. Banks, deceased, prays for leave to intervene, and further prays that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the judgment of that court in reversing the award rendered in favor of your petitioner and her minor children. R. C. Enos, Deputy Commissioner of the United States Department of Labor, under the Longshoremen's and Harbor Workers' Compensation Act, and in reversing the findings of fact and conclusions of law of the District Court Judge James B. Parsons, which affirmed the award of R. C. Enos, wherein a harbor worker,. was injured on January 30, 1961 and subsequently died as a result of said injuries, on February 12, 1961.

A. REFERENCE TO REPORTS OF OPINIONS.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in full in Appendix 1A. The findings of fact and the conclusions of law of the district court judge are reported in full in Appendix 1B.

B. STATEMENT OF JURISDICTIONAL GROUNDS.

The decision of the Court of Appeals for the Seventh Circuit was rendered on July 13, 1966. The petition for rehearing was denied by that court on October 6, 1966. A motion to extend time for the filing of a writ of certiorari to March 5, 1967, was allowed by Justice Tom C. Clark on January 4, 1967. Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C., Sec. 1254 (1).

C. QUESTIONS PRESENTED FOR REVIEW.

1. Do the claimants', widow and minor children, of a deceased Harbor Worker, have sufficient legal interest to present a petition for a writ of certiorari, when the U. S.

Attorney, who represented the Longshoremen's and Harbor Workers' Deputy Commissioner, pursuant to Title 33 U.S.C. Sec. 921 a, thereafter refused to proceed with such petition wherein claimants had been allowed an award for the death of the deceased Harbor Worker by the Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act, which award was subsequently affirmed by the district court judge, and thereafter reversed by the United States Court of Appeals?

2. Where under title 33 U.S.C. 922, the Deputy Commissioner in a case under the Longshoremen's and Harbor Workers' Compensation Act, has the power to issue a new order based on his own initiative or upon application of any other party in interest, because of mistake in determination of facts, is not contrary to said statute to invoke the doctrine of res judicata and deny the Deputy Commissioner that power especially where a timely petition had set forth facts of a new occurrence that caused the Harbor Worker's death and was the sole basis for the new order granting an award for the death of said Harbor Worker?

D. STATUTES AND REGULATIONS INVOLVED.

Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1437, as Amended:

33 U.S.C. 921 a

> "In any court proceedings under section 921 of this title of other provisions of this chapter, it shall be the duty of the United States attorney in the judicial district in which the case is pending to appear as attorney on behalf of the Secretary of Labor or his deputy commissioner when either is a party to the

case or interested, and to represent such Secretary or deputy in any court in which such case may be carried on appeal."

33 U.S.C. 922 (Section 22 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1437, as amended) provides in pertinent part:

> "Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation."

E. STATEMENT OF THE CASE.

Decedent, John J. Banks, employed by the Chicago Grain Trimmers Association, Inc., as a grain trimmer since 1934, which involves the loading and unloading of grain from barges and vessels, to and from various located grain elevators, with port locations and grain elevator locations varying from day to day, depending on traffic (incoming and outgoing).

On January 30, 1961, at approximately 4:45 P.M., upon arrival at his home from work and while at head of basement steps, he suddenly fell forward, with his arms at his sides striking the concrete floor approximately 10 steps down, at no time crying out or attempting to arrest his fall and thereby being rendered unconscious without

ever regaining his consciousness and expiring on February 21, 1961.

A claim was filed under the Longshoremen's and Harbor Workers' Compensation Act for compensation benefits on February 20, 1961, as number 46-71, alleging an accidental injury at work on January 26, 1961, which caused his fall on January 30, 1961. There were no eye witnesses to this occurrence and no testimony given regarding this accident except for some incomplete hearsay statements. The only possible evidence of any injury alleged to have accidentally occurred on January 26, 1961, was a little black speck on decedent's forehead. The Deputy Commissioner found that as a result of the evidence presented with relation to the *accident of January 26, 1961, that it was not established that the employee's death was the result of an injury which arose out of the course of his employment on January 26, 1961.* (A-10) This finding was made on June 8, 1961.

Subsequent to June 8, 1961 the claimant was notified that there was a witness to an accident which took place on January 30, 1961, at 2:30 P.M. (two hours prior to his fall from the top of the steps at home.) At the hearing of the first claim involving the alleged occurrence the eyewitness, Mike Miramontez, to the second occurrence was unknown to the claimant but was known to the respondent insurance company which had a statement from Mike Miramontez which told them about the occurrence of January 30, 1961, but this information was withheld by them from the Deputy Commissioner and the claimant. This witness was contacted and subsequent thereto another claim (46-73) was filed (within 1½ months subsequent to the rejection of the first claim) before the Longshoremen's and Harbor Workers' Commission alleg-

ing that John Banks was injured on January 30, 1961, which injury caused his death. This claim was filed on August 22, 1961. The respondent filed two forms in response to this claim. In both forms they assert the claim of res judicata because of the prior finding. (A. 101, 102) The second case was heard by the same Deputy Commissioner. After the second hearing he issued an award in favor of the claimants finding that the injury and death arose out of and in the course of his employment as a result of the accident of *January 30, 1961.* It is important to illustrate the salient features of each occurrence.

Accident 1	Accident 2
Date:	
January 26, 1961	January 30, 1961
Place:	
Gateway Elevators (A90) 127th & Calumet (A91) Chicago, Illinois	Norris Elevators (A23) 98th & Calumet River Chicago, Illinois
Eyewitnesses: None	Mike Miramontez (A23)
Time:	
Unknown	2:00 P.M. (A23)
Type of work:	
Button man (A8)	Tripper (A23)
How injured:	
Allegedly struck by steel cable in forehead. (Hearsay) (A 8, 91)	Struck on top of head by rope falling 50 feet weighing about 30 pounds. (A25)
Visual injury:	
Little black spot on forehead (A91)	Constant rubbing of head (A 24)

An action was filed in the United States District Court to set aside and enjoin the enforcement of the award of the deputy commissioner. The claimants were not represented in this hearing. Cross motions for summary judgment were filed with the district court and on June 2, 1965, the district judge adopted the findings of fact and conclusions of law filed on behalf of the Deputy Commissioner. An appeal was taken to the Court of Appeals (CA-7) who ruled that the original hearing relating to the alleged accident of *January 26, 1961,* was res judicata as to the accident of *January 30, 1961.*

F. THE RAISING OF THE FEDERAL QUESTION.

This petition is to review an order issued by the United States Court of Appeals for the Seventh Circuit, reversing an order of the United States District Court trial judge.

G. PROCEEDING IN FEDERAL COURTS.

The proceedings in the Federal Court is covered under the section on Statement of the Case.

H. REASONS FOR GRANTING WRIT OF CERTIORARI.

The opinion of the United States Court of Appeals for the Seventh Circuit in this cause greatly affects the practice of all cases involving the Longshoremen's and Harbor Workers' Compensation Act. It interprets a federal statute in derrogation of the intended purpose of said statute and contrary to the meaning that was given said statute by Congress.

The decision which is the subject of this Petition for a Writ of Certiorari involves the following conflicts, interpretations and rulings of other courts of appeals:

1. That the provision of the statute 33 U.S.C. 922 has no application to the facts in this matter.

Candado Stevedoring Co. v. *Willard,* 185 F. 2d 232 at 233 (2d Cir. 1950).

American Mut. Liability Co. v. *Lowe,* 85 F. 2d 625, at 627 and 628 (C.A. 3rd Cir. 1936).

Seaboard Marine Repair Co. v. *Cardillo,* 166 F. 2d 431, at 432 (C.A. 2d Cir. 1948).

2. The doctrine of res judicata as a bar to modification of an existing order is inconsistent with intent and meaning of. 33 U.S.C. 922.

Jarka Corporation v. *Hughes,* 299 F. 2d 534 (C.A. 2nd Cir. 1962).

Bethlehem S. B. Corp. v. *Cardillo,* 102 F. 2d 299, at 304 (C.A. 1st Cir. 1939).

Maryland Cas. Co. v. *Cardillo,* 99 F. 2d 432, at 434 (C.A. D.C. Cir. 1938).

3. The question of whether or not claimant petitioner, who was granted an award for death of husband Harbor Worker under (33 U.S.C. 901 et. seq.) and which award was affirmed by the District Court and subsequently reversed by the Court of Appeals (CA-7) and where U. S. Attorney refused to proceed further, has sufficient legal interest to be granted the right to file a Writ of Certiorari before the Superior Court has never been ruled on.

International U. United A.A. & A.I.W. v. *Scofield,* 86 S. Ct. 373 (1965).

AS TO THE RIGHT OF PETITIONER TO INTERVENE.

During the proceedings before the Deputy Commissioner arising out of the accident of January 30, 1961, claimants were represented by Harold A. Liebenson, the attorney representing the petitioner herein. After the award was granted in favor of the claimants the respondents instituted an action in the United States District Court against the Deputy Commissioner. Under 33 U.S.C. 921 a, the Deputy Commissioner, was represented by the United States Attorney's office. When the award was affirmed there was an appeal to the United States Court of Appeals for the Seventh Circuit. In this proceeding the Deputy Commissioner was again represented by the United States Attorney's Office, who in effect, was representing the claimants in that they were seeking to have the award affirmed. However, the Court of Appeals reversed the award and denied the Petition for Rehearing filed on behalf of the Deputy Commissioner. The attorney for the claimants who obtained the award then requested the United States Department of Justice who participated with the United States Attorney's office in the appeal to please seek a Writ of Certiorari thereby protecting the rights of the claimants. This request was denied on the last day for filing a petition for a writ of certiorari thereby foreclosing the rights of the petitioner. Motion was made to the United States Supreme Court to extend the time to file a Writ of Certiorari, which motion was allowed. Claimants through their attorney made a motion to intervene in the United States District Court in order to present the Petition for a Writ of Certiorari. This motion was denied by the United States District Judge on the basis that he had no jurisdiction over the matter. A copy of this order is attached as *Appendix I C.*

After the District Judge refused to grant the claimants leave to intervene the attorney for the claimants consulted with the United States Court of Appeals and was informed that the Mandate had been issued and that the court lost jurisdiction of the matter. The claimants have no alternative other than to present their Petition for Leave to Intervene and to present the Petition for a Writ of Certiorari at the same time. If the claimants are not granted leave to intervene they will be without remedy because of the United States Attorneys office refused to further protect their rights via appeal. Petitioner had not intervened prior to this time because she assumed that it was unnecessary to incur court costs and attorney's fees in that she felt that their rights were adequately represented by the United States Attorney's Office and the Department of Justice, pursuant to 33 U.S.C. 921 a. For the first time petitioner is placed in a position where she must act at all costs to protect her equity. By not going further, all is lost. This cannot happen under the above circumstances.

In view of the statutory's representatives refusal to act in reality creates a paradoxical situation in that such lack of action results in being the decision as though that of the court or jury, or both without any recourse whatsoever thus completely foreclosing the statutory benefits to the decedent's widow and his minor children. Therefore shouldn't the petitioner as a last resort be granted a right to file her writ in this court as a last resort where the proper authority has refused to act?

Your petitioner has found no case decided by the United States Supreme Court on the right to intervene in a proceeding in a lower court where an insurance carrier sought to intervene in the case of *U.S. Casualty Co.* v. *Taylor et ux,* (4th Cir., 1933) 64 F. 2d 521, at 526 the

court said, "The injured employee, the employer, and carrier are all clothed with a sufficient interest to intervene as a matter of cause, under the established practice prevailing in equity; and it cannot be supposed that it was the intent of Congress to forbid this just procedure merely because it failed expressly to authorize the joining of the successful party before the deputy commissioner as a defendant in a subsequent suit."

In the case of *International U., United A.A. & A.I.W.* v. *Scofield,* 382 U.S. 205, 86 S. Ct. 373 (1965) with reference to the right of a union to first intervene in the Court of Appeals, the Supreme Court allowed said intervention on the part of the unions who first applied for intervention in the Court of Appeals. The reasoning of this court in that case is even more applicable to this situation where the claimants are deprived of a monetary award for the death of a husband and father.

Claimants contend that they should now have the right to intervene to present this Petition for Writ of Certiorari.

AS TO SEC. 22 (TITLE 33 U.S.C. 922) OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

Section 22 (33 U.S.C. 922) of the Longshoremen's and Harbor Worker's Compensation Act has the purpose of protecting all parties for a period of one year subsequent to an award by a Deputy Commissioner. It is liberal with good reason. The Deputy Commissioner is not a lawyer. Many parties who present claims are not represented by lawyers. The Deputy Commissioner does not make findings of fact and conclusions of law as contemplated by 5 U.S.C. 1007 (b) in law suits. The absence of such

findings on undisputive evidence does not require a remand of either administrative or court decisions. *Vendemia* v. *Christaldi,* 221 F. 2d 103, 106 (C.A. D.C. Cir. 1955)

Under Sec. 22, the application of any party in interest should be filed within the one year period, but that does not mean that the deputy commissioner need decide the matter within one year of the prior decision. *Candado Stevedoring Corp.* v. *Willard,* 185 F. 2d 232, at 233 (C.A. 2d Cir. 1950); *American Mutual Liability Ins. Co. of Boston* v. *Lowe,* 85 F. 2d 625, at 627-628 (5th Cir. 1936); *Seaboard Marine Repair Co.* v. *Cardillo,* 166 F. 2d 431, at 432 (2nd Cir. 1948). In the case at bar, the first decision for the alleged occurrence of January 26, 1961, of the Deputy Commissioner denying benefits was rendered on June 8, 1961 (A. 10) The second application was filed 1½ months later, on August 22, 1961, for the accident of January 30, 1961. (A. 18) The deputy commissioner's award was timely under the law cited above because it was pertinent to the accident of January 30, 1961.

In the case of *Voris* v. *Eikel,* 346 U.S. 328, at 333 (1953) this Court said, "This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results". In the case of *Candado Stevedoring Corp.* v. *Willard, supra,* 185 F. 2d 232 at 233, the court said, "that the applicant called the paper he filed a 'claim for compensation' instead of an 'application' for review is of no moment." In the light of the facts involved in this case the respondents knew at the time of the original hearing that John Banks was hurt on January 30, 1961. This was substantiated by a written eye-witness statement in their possession which fully informed them of the occurrence of January 30, 1966. Said respon-

dants knowingly withheld said information from the Deputy Commissioner and from the claimants at the first hearing. Neither the claimants nor the Deputy Commissioner were apprised of the existence of said witness or the details of said occurrence at the time of the first hearing. When the information became available, approximately one month after the award denying benefits to the claimant, petitioner then filed the new application because it pertained to a different date and a different place than the first claim. The respondents immediately, in its pleadings, placed in issue the first case when they alleged the defense of "res judicata". The same Deputy Commissioner heard the facts of the second occurrence. He heard and saw the eye witness to the second occurrence. He found sufficient evidence and reason for the decedent to keel over two hours after he was hit on the top of the head with a weight of 30 pounds. It was not the same as in the first hearing where there were no witnesses to the occurrence; where the only injury was a speck on his forehead; where the man worked 3 days after the first occurrence. Does it matter that the deputy commissioner considered this as a different case or a rehearing? He knew at all times of the defense of "res judicata". He considered the difference between both cases. He knew that the respondent withheld the facts of the accident of January 30, 1961 at the time of the first hearing. Did it or should it make a difference that the application was labeled incorrectly? The fact is that within one year of the rejection of the first claim another claim was filed wherein it was alleged and proven before the same commissioner who heard the first case that the decedent harbor worker was hurt in the course of his employment which caused his death. Isn't this the type of situation that Congress must have had in mind to

protect the layman deputy commissioner and the longshoremen and harbor workers? Should the sophisticated insurance carrier be permitted to take advantage of a defense of "res judicata" in a situation such as this?

The case of *Candado Stevedoring Co.* v. *Willard,* 185 F. 2d 232 at 233, (C.A. 2d Cir. 1950) holds that it makes no difference whether the application is labeled "claim for compensation" or "petition for rehearing" as long as the application is filed within one year after the rejection of a claim. Nor must the case be decided in the one year period as long as the application is filed within the one year period following rejection of a claim the limitation statute is tolled. In accord are the cases of *American Mutual Liability Ins. Co. of Boston* v. *Lowe,* 85 F. 2d 625 at 627-628 (C.A. 5th Cir. 1936); and *Seaboard Marine Repair Co.* v. *Cardillo,* 166 F. 2d 431 at 432 (C.A. 2nd Cir. 1948).

In its opinion in this matter the Court of Appeals (C.A. 7) cites two reasons why Sec. 22 is not applicable: 1. The deputy commissioner was not aware of the January 30, 1961 injury until more than one year after the rejection of the first claim of January 26, 1961; and 2. This section is inapplicable to this case because the claimants at no time disputed the findings of fact made by the deputy commissioner for the first occurrence of January 26, 1961.

The first reason given for the inapplicability of Sec. 22 by the court is clearly erroneous in that the application was filed within 1½ months following the rejection of the claim (A. 18) and not more than one year as stated in the opinion of the court.

The court relied upon the case of *Flamm* v. *Hughes,* 329 F. 2d 378 at 380 (C.A. 2nd Cir. 1964) as the basis of its

reasoning that Sec. 22 is inapplicable because there was no disputing of facts within 30 days following the rejection of the first claim. The *Flam* case is clearly inapplicable in that Sec. 22 was not involved at all. In that case there was a request on the part of a widow to have the deputy commissioner reconsider his decision awarding benefits to her husband during his lifetime, said benefits were payable for the remainder of his life. After the death of her husband she sought additional compensation for herself. The sole basis of her lawsuit was that the Longshoremen's and Harbor Workers' Compensation Act was unconstitutional. There was no additional hearing in which additional evidence was heard. She did not claim that the deputy commissioner erred in applying the statute or that the evidence was incorrect. She did not seek to have Sec. 22 apply because she had no change in facts or conditions to present to the deputy commissioner. In the case at bar there were additional facts and witnesses presented showing a change which proved that there was a mistake in the determination of the facts and a change in the conditions. Though the petition was not expressly labeled "petition for rehearing" the deputy commissioner knew that it was in that he had heard the original case, and knew of the contention of res judicata by the respondent. No evidence of the January 30, 1961 injury could have been presented on behalf of the claimants at the original hearing because the claimants knew of no witnesses at that time to present them to the deputy commissioner. However, the respondents knew of such witnesses and withheld this knowledge from the deputy commissioner and the claimants.

The reviewing court in its opinion seems to indicate that the claimant must file a petition within 30 days disputing the findings of fact of the deputy commissioner as

a prerequisite to having Sec. 22 apply. (F.N. p. 7 of opinion) This is clearly erroneous. If this interpretation was correct it would negate the purpose of Sec. 22. Sec. 22 was expressly intended to authorize the deputy commissioner to consider newly presented evidence after a previous determination of facts has become final in 30 days. It takes effect after the 30 day period when the deputy commissioner's findings are not contested and thus become final. The whole purpose of this section is to prevent the application of the doctrine of res judicata. Cases in support of the position that Sec. 22 applies after the 30 day period in which the findings of the deputy commissioner becomes final are: *Tudman* v. *American Ship Bldg. Co.*, 170 F. 2d 842 at 844 (C.A. 7th Cir. 1948); *Stansfield* v. *Lykes Bros. S. S. Co.*, 124 F. 2d 999 at 1004 (C.A. 5th Cir. 1942); *Calbeck* v. *A. D. Suderman Stevedoring Co.*, 290 F. 2d 308 at 309 (C.A. 5th Cir. 1961); *Jarka Corporation* v. *Hughes*, 299 F. 2d 534 (2nd Cir. 1962).

Thus the basis upon which the Court of Appeals rendered its decision denying the applicability of Sec. 22 of the Longshoremen's and Harbor Workers' Compensation Act is unfounded both in law and in fact. It contradicts other decisions of other federal circuits, thereby creating a conflict which can affect the great volume of claims filed under the Longshoremen's and Harbor Workers' Compensation Act. What makes it more serious is that in most instances the deputy commissioners' who have to interpret the effect of this decision will not be legally trained to adequately evaluate this decision in light with other existing conflicting decisions among the various circuits.

If this decision is not overruled, there will be considerable conflict among the Federal circuits on the questions of:

1. Whether or not the doctrine of res judicata can be applied during the one year period while section 22 of the Act 33 U.S.C. 922 is applicable;

2. Whether a petition for a rehearing must be filed within 30 days after an award by a Deputy Commissioner before section 22 can be applied;

3. Whether a claim must be specifically labeled with the magic words of "Petition for Rehearing" or "Petition for Review" before section 22 can be applicable;

4. Whether a Deputy Commissioner has the right to review a case under section 22 unless it is properly labeled;

5. Whether the Longshoremen's and Harbor Workers' Compensation Act is to be given liberal or strict interpretation;

6. Whether one occurrence on a separate place, date, time and circumstances can be res judicata for another factual occurrence;

7. How can it be said that an interested party who knowingly and willfully withheld pertinent information before the forum or court is "with clean hands" in an equity proceeding especially when such withholding of information is by design to defeat the claim.

CONCLUSION.

For the foregoing reasons we urge this court to grant the petitioner leave to intervene, to file this petition for a Writ of Certiorari, and to issue its Writ of Certiorari to the United States Court of Appeals for the 7th Circuit, to the end that the order of that Court may be reviewed.

Respectfully submitted,

HAROLD A. LIEBENSON
77 West Washington Street
Chicago, Illinois 60602
726-9242
Attorney for Petitioner
Agnes M. Banks

APPENDIX.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 15342 SEPTEMBER TERM, 1965 APRIL SESSION, 1966

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., and NEW AMSTERDAM CASUALTY COMPANY,
Plaintiffs-Appellants,
v.
R. C. ENOS,
Deputy Commissioner,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JULY 13, 1966

Before DUFFY, KNOCH, and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* A determinative question presented in this appeal is whether the doctrine of res judicata should be applied to a claim for compensation death benefits filed under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, because of an administrative denial of a prior claim filed by the same dependents seeking similar relief.

This action was instituted under section 921 of the act to set aside an order of the deputy commissioner, Department of Labor, dated January 27, 1964, granting compensation death benefits to the widow and minor children of John J. Banks, deceased. The plaintiffs are the Chi-

cago Grain Trimmers Association, the employer of Banks, and the New Amsterdam Casualty Company, its compensation insurance carrier. After considering cross-motions for summary judgment, the district court entered judgment affirming the decision of the deputy commissioner. The court held that the deputy commissioner's findings were supported by substantial evidence in the administrative record and that his decision and award were in accordance with law.

Three issues have been presented in this appeal: (1) whether substantial evidence supports the finding of the deputy commissioner that an injury to the deceased employee during the course of his employment resulted in his death; (2) whether the entry of a remittitur by the administratrix of the deceased employee's estate in a third-party wrongful death action without the employer's consent constitutes a "compromise" within the meaning of the act, barring a claim for death benefits; and (3) whether a prior decision of the deputy commissioner that an injury allegedly sustained by the employee in the course of his employment did not result in his death bars a subsequent claim that a different injury sustained by the employee while at work resulted in his fatality. Because we are convinced that the plaintiffs should prevail on the third issue, our discussion will be confined to that point.

At the time of his death on February 12, 1961, John J. Banks was an employee of the Chicago Grain Trimmers Association. He had worked as a grain trimmer since 1934, loading and unloading grain-carrying barges and vessels. In the late afternoon of January 30, 1961, after returning from work, Banks was standing at the head of the basement stairs in his home. Suddenly he pitched forward, falling eleven steps. His head struck the concrete floor, causing injuries that resulted in death thirteen days later.

The first claim for compensation benefits, filed on February 20, 1961 by the widow, Agnes Banks, for herself and her minor children, alleged that Banks sustained an acci-

dental injury at work on January 26, 1961 which caused his fall at home on January 30, thereby incurring other injuries which resulted in death. At the hearing on this claim there was testimony that the deceased was struck by a cable on January 26 while working on a barge. Other witnesses, including several coworkers, testified that they did not see Banks suffer any accidental injury on that date and that during the subsequent three days he did not complain of illness. The deputy commissioner found that Banks died as a result of injuries incurred by the fall in his home, but the evidence failed to establish that the fall was the consequence of an injury arising in the course of his employment. The claim for compensation was rejected.

On August 22, 1961, a second claim was filed by the widow in behalf of herself and her minor children alleging that Banks sustained an accidental injury on January 30, 1961 while working on a barge, which caused fatal injuries in his home on the same date. Shortly thereafter, the widow, as administratrix of her husband's estate, brought a wrongful death action in the federal district court against the Norris Grain Company.[1] She claimed that Norris was responsible for the breaking of a rope (which was stretched from a barge to a tower adjacent to one of its grain elevators) on January 30, 1961 which struck her husband on the head, eventually resulting in his death. The jury returned a verdict in her favor.[2]

---

[1] The complaint filed in the case at bar alleged that on September 21, 1961 at a pre-trial conference held by the deputy commissioner, counsel for the claimants requested that the hearing on the second claim be postponed pending disposition of the wrongful death action. In his answer, the defendant neither admitted nor denied the allegation.

[2] The verdict was in the amount of $30,000. The Norris Grain Company moved either to set aside the verdict or to grant a new trial. The district court indicated a new trial would be granted unless Mrs. Banks filed a remittitur in the amount of $11,000. The remittitur was filed, and a $19,000 judgment was entered and satisfied.

Over the objection of the Grain Trimmers Association and its insurer, the deputy commissioner thereafter proceeded to entertain the second claim for compensation. Although jurisdiction to hear this application was challenged because of the prior finding that death had not resulted from employment, the deputy commissioner concluded that a hearing was justified because the claim concerned a different date of injury than that alleged previously. At this second hearing both parties presented testimony relating to the alleged occurrence of an accidental injury on January 30, 1961.[3] The claimants presented evidence that the rope, stretched from the barge to the tower broke and a "whole pile" fell on Banks' head. Witnesses for the employer denied knowledge of the rope breaking or of any complaint made by the deceased about the alleged incident. At the conclusion of the hearing the deputy commissioner found that the deceased suffered an injury while at work on January 30, 1961 producing an acute subdural hematoma, which caused him to fall down a flight of steps in his home two hours later. The deputy commissioner proceeded to make the compensation award challenged by the plaintiffs in the instant proceeding.

Turning to the question before us, both claims filed by the widow for herself and her minor children sought benefits under the compensation act for the death of the husband as the result of injuries sustained in his home. The only difference in the claims is that initially an accidental injury during employment on January 26 was asserted as being the cause of Banks' fall, whereas in the subsequent

---

[3] No mention was made of the alleged January 30 incident at the hearing on the first claim. The widow testified at the hearing on the second claim that in February 1961 (prior to the first hearing) her son told her of a rope-falling incident at work on January 30 and that it was discussed by the family and with her attorney. She stated that she did not mention the January 30th injury at the first hearing, however, because "it was forgotten about, and it wasn't until even after the other trials," that she remembered having been told of the injury.

claim a predisposing accidental injury was alleged to have occurred on January 30, both in 1961. In the first hearing the evidence was directed to an alleged incident on January 26; in the second it was confined to the alleged incident on January 30. Although the claims presented different factual issues, these particular issues were intermediary to a determination of whether there was a causal relationship between the deceased's employment and the fatal fall in his home. The fall and the resulting injury and death were the ultimate occurrences upon which both asserted claims depended. This identity of ultimate issues constituted a single claim for compensation rather than two separate ones.

An analogous situation was present in *Baltimore S.S. Co.* v. *Phillips,* 274 U.S. 316 (1927). There a seaman employed aboard a vessel was injured by the fall of a strongback used to support a portion of a hatch. A libel was filed in admiralty alleging that the injury was caused by negligence in failing to provide a safe place to work and to use reasonable care and by the unseaworthiness and the insufficiency of gear and tackle, and, in the alternative, if no negligence was established, for maintenance and cure. The federal district court found that the accident was not due to the negligence alleged, that is, the faulty design and construction of certain gear, but to the grossly negligent manner in which dunnage was removed from the hold. The court denied full indemnity by way of damages but awarded the cost of maintenance and cure. In a subsequent suit, the plaintiff sought recovery under the Jones Act alleging negligence of the ship's officers and employees in handling seaworthy gear. The plaintiff was awarded damages in the district court. The circuit court of appeals affirmed, but the Supreme Court reversed. In the course of its opinion, the Court first defined res judicata as follows:

> The effect of a judgment or decree as *res judicata* depends upon whether the second action or suit is upon the same or a different cause of action. If upon

> the same cause of action, the judgment or decree upon the merits in the first case is an absolute bar to the subsequent action or suit between the same parties or those in privity with them, not only in respect of every matter which was actually offered and received to sustain the demand, but also as to every ground of recovery which might have been presented. 274 U.S. at 319.

Then, after referring to the opinion of the lower court that there was no identity of the causes of action because the grounds of negligence pleaded were "distinct and different in character," the Court declared:

> Upon principle, it is perfectly plain that the respondent suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.
>
> A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. "The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. 'The *thing*, therefore, which in contemplation of law as its *cause*, becomes a ground for action, is not the group of *facts* alleged in the declaration, bill, or

> indictment, *but the result of these in a legal wrong, the existence of which, if true, they conclusively evince.'" Ibid.*

In the instant case the two events which were alleged to have occurred during the decedent's employment resulted in but one actionable ground for compensation benefits, the fatal fall in the home, even though those events were distinct as to time and character. If the decedent had been struck on the head by a cable and seconds later had suffered a similar injury by a falling rope and the occurrences whether singly or in combination had caused his fall, the analogy of these supposed events with the several and distinct acts of negligence referred to in *Phillips* would be more obvious. Accordingly, it was incumbent upon the claimants to assert in one claim all the incidents of employment which singly or in combination were alleged to have caused the fall in the home.

It would seem that this determination should call for an application of the doctrine of res judicata so as to bar the second claim. Although the defendant makes some effort to distinguish the issues because of the difference in the alleged predisposing injuries, his principal contention is that res judicata should not be applied because of the administrative nature of the proceeding. He maintains that the doctrine ordinarily has no application to decisions of administrative agencies, citing among other cases, *Churchill Tabernacle* v. *FCC*, 160 F.2d 244 (D.C. Cir. 1947), and *Niagara Mohawk Power Corp.* v. *FPC*, 202 F.2d 190 (D.C. Cir. 1952), *aff'd*, 347 U.S. 239 (1954). As a corollary it is argued that this ought to be true particularly with respect to administrative actions in claims for workmen's compensation because policy considerations which may have influenced this type of legislation outweigh the need to put an end to litigation of the same issues between the same parties.[4]

---

[4] The defendant asserts that Congress was so concerned with resulting inequities if full res judicata effect were given to compensation decisions under the act, that it

There are many administrative decisions as to which res judicata does not apply, for reasons peculiar to the nature and subject matter of many administrative proceedings. In such cases the reasons underlying the doctrine are either not relevant or outweighed by other considerations. as an examination of the cases cited by the defendant will demonstrate. *Churchill Tabernacle* v. *FCC, supra.* for example, concerned the renewal of a license to operate a radio station. The court held that the Commission "is empowered to establish a new policy, and apply it to the renewal of an old license, despite the fact it is inconsistent with a previous decision. This follows from the statutory duty of the Commission to examine each application for renewal of license as an original proceeding and grant or refuse it in the public interest." 160 F.2d at 246. In *Niagara Mohawk Power Corp.* v. *FPC, supra,* the court refused to apply res judicata to an earlier decision by the Federal Power Commission (which the court characterized as an order that "amounted to nothing more than a refusal to agree to the licensee's proposal that the license be amended") on the principal ground that the prior administrative action was unreviewable.

On the other hand, there are many cases holding that res judicata should be applied to administrative decisions when there are justifiable circumstances present. For ex-

---

[4] (Cont.)
amended section 22 of the statute, 33 U.S.C. § 922, to permit review of a compensation claim "because of a mistake in a determination of fact by the deputy commissioner" at any time prior to one year after its rejection. The defendant concedes that the provision has no direct application to this case because "the Deputy Commissioner was not aware of the January 30 injury until more than 'one year after the rejection' of the first claim." In any event, the section is inapplicable to this case because the claimants at no time disputed the findings of fact made by the deputy commissioner at the first hearing. *Flamm* v. *Hughes,* 329 F. 2d 378, 380 (2d Cir. 1964).

ample, it has frequently been held that the decisions of the Tax Court, an administrative agency, may be res judicata. *Commissioner* v. *Sunnen,* 333 U.S. 591 (1948); *Fairmount Aluminum Co.* v. *Commissioner,* 222 F.2d 622 (4th Cir. 1955); *Lynch* v. *Commissioner,* 216 F.2d 574 (7th Cir. 1954). A determination of the National Bituminous Commission that a producer's coal was "bituminous," which had the collateral effect of subjecting the producer to a certain tax, was held to be res judicata in a suit to enjoin the collection of the tax. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381 (1940). The doctrine was applied to an Interstate Commerce Commission decision in *Seatrain Lines, Inc.* v. *Pennsylvania R.R.,* 207 F.2d 255 (3d Cir. 1953). On this subject Professor Davis stated, "The authorities that administrative determinations may be res judicata are much stronger and much more numerous than the authorities to the contrary."[5]

The problem, however, is to determine when an administrative finding is res judicata and when it is not. A number of tests have been suggested and applied.[6] It seems that no single test has evolved. One approach is to inquire whether the particular administrative proceeding under examination was essentially "judicial" in nature rather than "administrative." *Fairmount Aluminum Co.* v. *Commissioner, supra* at 627. Although this approach has been criticized,[7] it occurs to us that it is the most logical one to apply in the instant case. The ultimate factual issues would be the same whether presented in a claim for compensation under the act or in a wrongful death action filed in a court of law. Therefore the administrative process in this case was essentially judicial. Again we quote Professor Davis: "That the doctrine of res judicata should be applied in full force to some administrative action seems clear beyond question. The doctrine is at its

---

[5] 2 DAVIS, ADMINISTRATIVE LAW 554 (1958).

[6] See Schopflocher, *The Doctrine of Res Judicata in Administrative Law,* WIS. L. REV. 1-42, 198-235 (1942).

[7] *Id.* at 38.

best as it applies to an adjudication of past facts, where the second proceeding involves the same claim or the same transaction.'"[8] Here an adjudication of past events was required and, as we have demonstrated, the claims as to ultimate issues were identical.

That a primary purpose of workmen's compensation legislation is to give greater protection and security to the employee and his dependents against injury or death occurring during employment and to remove the necessity of proving fault or negligence is not a sufficient reason to abrogate entirely the application of res judicata in compensation proceedings. Indeed the doctrine has been applied to the award as well as to the denial of claims under state workmen's compensation acts with respect to whether injury or death occurred during employment. *Trupasso* v. *McKie Lighter Co.*, 79 F.Supp. 641 (D. Mass. 1948); *French* v. *Rishell*, 40 Cal. 2d 477, 254 P.2d 26 (1953); *Hannah* v. *Oklahoma State Highway Comm'n*, 172 Okla. 221, 45 P.2d 53 (1935); *Doca* v. *Federal Stevedoring Co.*, 116 N.Y.S. 2d 25 (1952), *aff'd*, 305 N.I. 648, 112 N.E.2d 424 (1953).

In summary, we hold that the deputy commissioner should not have entertained the second claim because it was barred by res judicata.

The judgment of the district court is reversed.

---

[8] 2 DAVIS, ADMINISTRATIVE LAW 559 (1958).

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This matter coming on to be determined before the Court, without jury, and upon cross-motions for summary judgment by the plaintiffs and the defendant, and the Court having considered the pleadings on file, briefs, and the transcript of proceedings before the defendant, Deputy Commissioner of Labor, and being fully advised in the premises makes the following:

FINDINGS OF FACT.

1. This action is an appeal by the Chicago Grain Trimmers Association, Inc., and its insurance carrier, New Amsterdam Casualty Company, seeking reversal of an award of compensation benefits made by the defendant, Deputy Commissioner, R. C. Enos, to Agnes M. Banks.

2. This Court adopts as its findings of fact the statements of facts contained in the compensation order of the defendant, Deputy Commissioner, as more fully set forth in the entire record of proceedings before the Deputy Commissioner;

Wherefore, upon the foregoing facts this Court makes the following:

CONCLUSIONS OF LAW.

1. The Court has jurisdiction of the parties and the subject matter, pursuant to the Longshoremen's and Harbor Workers' Compensation Act, as amended, 44 Stat. 1424, as amended.

2. There is no genuine issue of material fact presented herein, and this action may properly be determined upon the cross-motions for summary judgment filed by the plaintiffs and the defendant.

3. There is substantial evidence in the transcript of administrative proceedings which supports the findings of fact of the defendant, Deputy Commissioner, and the award based thereupon; and the decision and award of the defendant, Deputy Commissioner, was in accordance with law and is therefore final and conclusive; this Court must therefore grant the defendant's motion for summary judgment and deny the plaintiff's motion for summary judgment, affirm the decision and award of the defendant, Deputy Commissioner of Labor, and dismiss the Complaint.

Enter: /s/ James B. Parsons
Judge

Dated: June 2, 1965.

ORDER ENTERED JUNE 2, 1965.

It is ordered and adjudged that, the defendant's motion for summary judgment is allowed; the plaintiff's motion for summary judgment is denied; the compensation order of the Deputy Commissioner is affirmed, and the action dismissed on the merits.

Enter: /s/ James B. Parsons

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., and NEW AMSTERDAM CASUALTY COMPANY,
Plaintiffs,
vs.
R. C. ENOS, Deputy Commissioner,
Defendant.
No. 64 C 306

ORDER

On motion of Agnes M. Banks, widow of John J. Banks, Deceased, and representative of James M. Banks, Janice M. Banks and Catherine M. Banks, minor children of John J. Banks, Deceased, for leave of Court to intervene as additional party defendant so that she may be able to perfect an appeal for filing a Writ of Certiorari to the United States Supreme Court in the above entitled cause, due notice having been given the parties hereto, and the Court being advised of the premises,

It Is Hereby Ordered:

That the motion is denied on the ground that the Court has no jurisdiction at this time to entertain said motion.

Enter: /s/ James B. Parsons
Judge

Director, Liebenson & Raszus
Attorneys for Claimant
77 W. Washington Street
Chicago, Illinois 60602
RAndolph 6-9242